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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA,
11
Plaintiff,
12
v.
13
OSCAR ERNESTO ROMERO-ROMERO,
14 JR.,
15
Defendant.
16

No. CR-07-711 MMC

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**DEFENDANT ROMERO-ROMERO'S
MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
INDICTMENT ON GROUNDS THAT
PRIOR DEPORTATION CANNOT
SERVE AS PREDICATE FOR ILLEGAL
REENTRY PROSECUTION**

Hearing Date: July 30, 2008
Time: 2:30 pm
Court: Hon. Maxine M. Chesney

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17
18 TO: UNITED STATES OF AMERICA, PLAINTIFF; AND JOSEPH
19 RUSSONIELLO, UNITED STATES ATTORNEY, NORTHERN DISTRICT OF
CALIFORNIA; AND TAREK HELOU, ASSISTANT UNITED STATES
ATTORNEY:

20 PLEASE TAKE NOTICE that on July 2, 2008, at 10:00 a.m., before the Honorable
21 Maxine M. Chesney, defendant Oscar Ernesto Romero-Romero, Jr. will move this Court to
22 dismiss the indictment on the grounds that the prior deportation order was entered after
23 constitutionally defective deportation proceedings and therefore cannot serve as a predicate for a
24 prosecution under 8 U.S.C. § 1326.
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26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Oscar Ernesto Romero-Romero, Jr. is charged in a one count indictment with a
4 violation of 8 U.S.C. § 1326, illegal reentry after deportation. The indictment against Mr.
5 Romero-Romero should be dismissed on the grounds that his deportation in 2004, as a matter of
6 law, cannot constitute the prior lawful deportation order necessary for the government to
7 establish the deportation element of a violation of 8 U.S.C. § 1326. Mr. Romero-Romero is a
8 citizen of the United States and was at the time he was ordered deported in 2004. Indeed, he
9 derived citizenship from his mother in 1996 when she naturalized as a citizen of the United
10 States. Accordingly, the immigration judge's order of removal is fundamentally flawed as she
11 had no authority to deport a citizen. The IJ misconstrued the standard for derivative citizenship;
12 had she applied the proper standard, Mr. Romero-Romero would not have been deported.

13 In addition, Mr. Romero-Romero's counsel, Timothy Myers, provided constitutionally
14 ineffective assistance. First, Mr. Myers completely failed to present Mr. Romero-Romero's
15 derivative citizenship claim even though he had a strong claim for citizenship. Second, Mr.
16 Myers failed to undertake even the most minimal investigation to determine the status of Mr.
17 Romero-Romero's parents' marriage. Third, Mr. Myers failed to consider the proper standard for
18 derivative citizenship and ignored evidence that would have established Mr. Romero-Romero's
19 derivative citizenship. Finally, Mr. Myers informed the immigration court, as well as Mr.
20 Romero-Romero, that he had filed a petition to certify Mr. Romero-Romero's citizenship, when
21 he had not done so. The attorney's inaction with respect to each of these issues fell below a
22 minimum standard of competence. As a result, Mr. Romero-Romero stipulated to being removed
23 from the United States and waived his right to appeal in reliance on the misleading information
24 from the IJ and his counsel. Had his counsel provided competent assistance, Mr. Romero-
25 Romero would not have been deported from the United States because he was a citizen of the
26 United States.

1 Under these circumstances, the underlying deportation order cannot serve as a predicate
2 for a prosecution for illegal reentry. As the aforementioned deportation was Mr. Romero-
3 Romero's sole deportation or removal from the United States, this case presents an unusual
4 situation requiring that the indictment be dismissed.

5 II. STATEMENT OF FACTS

6 A. MR. ROMERO-ROMERO'S BACKGROUND

7 Mr. Romero-Romero was born on May 11, 1980 in El Salvador. *See* Declaration of
8 Sandra Evelyn Romero (hereinafter "Ms. Romero Decl"), attached to Declaration of Jodi Linker
9 Authenticating Documents (hereinafter "Linker Auth. Decl.") as Exhibit H. His parents are
10 Sandra Evelyn Romero (hereinafter "Ms. Romero") and Oscar Ernesto Romero Ventura
11 (hereinafter "Mr. Ventura"). *Id.* In 1983, at the age of three, Mr. Romero-Romero's family left
12 El Salvador to try to find a better life in the United States. *Id.* They moved to Los Angeles,
13 California near Ms. Romero's mother. *Id.* Mr. Romero-Romero's father worked as a truck
14 driver and his mother worked as a housekeeper. *Id.* On March 30, 1989, when he was eight
15 years old, Mr. Romero-Romero became a Lawful Permanent Resident (hereinafter "LPR") of the
16 United States. *Id.* He attended public school, and lived with his parents and four siblings, Hilda,
17 Sandra, Ernesto and Jancy. *Id.*

18 Mr. Romero-Romero's parents were married on February 8, 1987; however, their
19 marriage was rocky from the start – they often fought and Mr. Ventura was physically abusive of
20 Ms. Romero. *Id.* Mr. Ventura soon began having an affair with another woman. *Id.* &
21 Declaration of Oscar Ernesto Romero Ventura (hereinafter "Ventura Decl"), attached to the
22 Linker Auth. Decl. as Exhibit I. On July 7, 1991, Mr. Ventura was caught attempting to
23 smuggle three undocumented individuals into the United States. *See* In the Matter of Oscar
24 Ernest Romero-Ventura, Additional Charges of Deportability, dated September 13, 1991,
25 attached to the Linker Auth. Decl. as Exhibit A. As the government alleged in the Charges of
26 Deportability against Mr. Ventura, one of those individuals was, Ada del Carmen Romero Torres

1 (hereinafter “Ms. Torres”), who was the woman with whom Mr. Ventura had been having an
2 affair. *See* Ventura Decl, attached to the Linker Auth. Decl. as Exhibit I. At that time, Ms.
3 Torres was already pregnant with Mr. Ventura’s child, and he was trying to bring her into the
4 United States so that he could live with her and their soon-to-be-born child. *Id.*

5 As a result of Mr. Ventura’s conduct, he was ordered removed from the United States on
6 March 23, 1992, and was actually deported on May 14, 1992. *See* Order of the Immigration
7 Judge In the Matter of Oscar Ernesto Romero Ventura, dated March 23, 1992, attached to Linker
8 Auth. Decl. as Exhibit B. Ms. Torres, however, remained in the United States and gave birth to
9 her and Mr. Ventura’s daughter Tanya Venerise Romero on September 10, 1991 in Los Angeles,
10 California.

11 Mr. Ventura told Ms. Romero about his affair and that he was having a child with another
12 woman. Ms. Romero was infuriated to learn this and, at that point, it was clear to her that their
13 marriage was over. *See* Ventura Decl. & Ms. Romero Decl., attached to Linker Auth. Decl. as
14 Exhibits I & H. They began and continued to live apart from one and other. *Id.* Accordingly, as
15 of Mr. Romero’s deportation in 1992, there had been a final rupture in their marriage and neither
16 of them had any intention of continuing the marital relationship. *Id.* All of the children,
17 including the defendant, continued to live in the sole custody of their mother, Ms. Romero. *Id.*

18 On November 30, 1994, Ms. Romero filed an application for naturalization. *See*
19 Application for Naturalization dated November 30, 1994, attached to Linker Auth. Decl. as
20 Exhibit C. On that application, she was asked to check a box regarding her marital status and
21 was provided four options: (1) Single; (2) Married; (3) Divorced; or (4) Widowed. *Id.* As she
22 was still technically married, she truthfully indicated that on her application. *See* Ms. Romero
23 Decl., attached to Linker Auth. Decl. as Exhibit H. She also truthfully indicated on the
24 application that all of her children, except her daughter Sandra, were living with her at that time.
25 *See* Application for Naturalization dated November 30, 1994, attached to Linker Auth. Decl. as
26 Exhibit C. On January 10, 1996, Ms. Romero was interviewed by an immigration official as

1 part of her naturalization application. *Id.* She truthfully answered all of the questions asked of
2 her. On May 30, 1996, when Mr. Romero-Romero was just 16 years-old, Ms. Romero became a
3 naturalized citizen of the United States. *See* Certificate of Naturalization dated May 30, 1996,
4 attached to Linker Auth. Decl. as Exhibit D.

5 Mr. Romero-Romero became a citizen of the United States at the time of his mother's
6 naturalization on May 30, 1996 under the law because: (1) he was under 18 years of age; (2) he
7 was unmarried; (3) he had been residing in the United States pursuant to a lawful admission for
8 permanent residence; and (4) his mother had legal custody of him after a legal separation of his
9 parents. *See* Immigration and Naturalization Act (hereinafter "INA") § 321(a); 8 U.S.C. § 1432
10 (1996).

11 **B. MR. ROMERO-ROMERO'S REMOVAL FROM THE UNITED STATES**

12 On March 6, 2002, Mr. Romero-Romero was convicted of violating California Penal
13 Code § 288a(b)(1), oral copulation with a person under 18 and California Penal Code § 261.5(c),
14 statutory rape. While he was originally sentenced to three years of probation, he was found to
15 have violated the terms of his probation and was therefore sentenced to two years in custody.
16 Because of this conviction, the Immigration and Naturalization Service (hereinafter "INS") (now
17 "ICE") initiated removal proceedings against him on July 14, 2003. *See* Notice to Appear and
18 Warrant for Arrest dated July 14, 2003, attached to Linker Auth. Decl. as Exhibit E. The Notice
19 to Appear alleged that Mr. Romero-Romero was removable from the United States under INA §
20 237(a)(2)(A)(iii) for having been convicted of an aggravated felony, to wit, sexual abuse of a
21 minor. *Id.*

22 Mr. Romero-Romero then had six hearings regarding his removal. *See* Audio Recordings
23 of Immigration Proceedings and Related Transcriptions, attached to Linker Auth. Decl. as
24 Exhibits K & L. Each of his hearings was before Immigration Judge Rose Peters (hereinafter "IJ
25 Peters"). *Id.* At his first hearing on September 2, 2003, Mr. Romero-Romero was not
26 represented by counsel. Transcription of Immigration Hearing, Sept. 2, 2003, attached to Linker

1 Auth. Decl. as Exhibit L-1. At that time, IJ Peters asked Mr. Romero-Romero several direct
 2 questions relevant to his derivative citizenship and he answered each question truthfully and
 3 succinctly as follows:

4 IJ: . . . Are you married?

OR: No, ma'am

5 IJ: Do you have children?

OR: No, ma'am.

6 IJ: Where is your mother?

OR: Uhh, living in Fontana, California.

7 IJ: And what's her immigration status?

OR: She's a U.S. citizen.

8 IJ: And she naturalized?

OR: Yes, ma'am.

9 IJ: When did she naturalize?

OR: 1996.

10 IJ: And you were born May 11, 1980?

OR: Yes, ma'am.

11 IJ: And your mother's married to your father Oscar?

OR: Yes, ma'am.

12 IJ: What's his immigration status?

OR: Umm, he was dep . . . umm, he was a legal permanent resident but was deported.

13 IJ: In 1992?

OR: Yes, ma'am.

14 IJ: And he's back in the United States?

OR: No, ma'am. I don't know.

15 IJ: I'm sorry?

OR: Umm, I don't know.

16 IJ: Is your mother still married to him?

OR: Yes.

17 IJ: I can't hear you.

OR: Yes, ma'am.

18 *Id.* While IJ Peters asked whether his mother was "married to" his father, she never asked
 19 whether they were separated at the time of his mother's naturalization. Even after Mr. Romero-
 20 Romero stated that he did not know whether his father was back in the United States after having
 21 been deported 11 years prior, she did not inquire about the status of the parents' marriage beyond
 22 asking whether they were still married. From this colloquy, it is clear that IJ Peters was on notice
 23 that Mr. Romero-Romero may have a claim to derivative citizenship because his mother had
 24 naturalized when he was under 18 years of age and he had been a lawful permanent resident. IJ
 25 Peters, however, never mentions derivative citizenship to Mr. Romero-Romero nor does she
 26 advise him of his potential eligibility for such status.

1 Prior to Mr. Romero-Romero's next hearing, his family hired an attorney to represent
2 him. *See* Ms. Romero Decl., attached to Linker Auth. Decl. as Exhibit H. Specifically, Ms.
3 Romero retained the Law Offices of Earl Carter, a law firm she understood to specialize in
4 immigration law. *Id.* At the next hearing on September 16, 2003, Timothy Myers from the Law
5 Offices of Earl Carter appeared on behalf of Mr. Romero-Romero. Transcription of Immigration
6 Hearing, Sept. 16, 2003, attached to Linker Auth. Decl. as Exhibit L-2. At that appearance, the
7 issue of Mr. Romero-Romero's derivative citizenship was explicitly raised by Mr. Myers who
8 informed IJ Peters that he was going to file an "N-600," the petition to certify Mr. Romero-
9 Romero's derivative citizenship, with the immigration service. *Id.* Mr. Myers explained that
10 when Ms. Romero naturalized, Mr. Romero-Romero was an LPR, under 18 years of age, in the
11 sole custody of his mother, and his father had been deported from the United States. *Id.*

12 IJ Peters then inquired whether Mr. Romero-Romero's parents were divorced, even
13 though the derivative citizenship statute does not require an actual divorce. *Id.* She also then
14 incorrectly stated that she "explored this already with the respondent and it was his understanding
15 there was no legal separation so, without legal custody of the respondent, even though there's an
16 informal separation, that's not going to do the trick." *Id.* In fact, she had not done so, and had
17 only asked Mr. Romero-Romero whether his parents were still married; she never inquired
18 whether they were separated, nor did she inquire specifically about the status of the marriage
19 during the relevant time period, *i.e.*, when he was under 18 years of age. Accordingly, while she
20 knew that his parents were married and not divorced, she certainly did not have sufficient
21 information to conclude that they were not legally separated under the statute, particularly given
22 Mr. Romero-Romero's comment that he did not know where his father was.

23 Later in the hearing, Mr. Myers informed IJ Peters: "Also, I mean, we've got this N-600
24 we'd at least like to submit and see where they are going to go with it and have our evidence at
25 least looked at so that I can talk to mom, go through and see if there's any type of formal
26 separation filed or, so I don't know if two weeks is enough to even" *Id.* In fact, Mr. Myers

1 never talked to Mr. Romero's mom about whether she was separated from Mr. Ventura when she
2 naturalized. *See* Ms. Romero Decl., attached to Linker Auth. Decl. as Exhibit H. Had he done
3 so, she would have informed him that they were separated at that time, and had been separated
4 since 1992. *Id.* Nor did Mr. Myers discuss with her his belief that a formal court order of
5 separation was necessary. *Id.* Had he done so, Ms. Romero would have filed the necessary court
6 documents to formally establish that she had separated from Mr. Ventura in 1992. *Id.*

7 At Mr. Romero-Romero's third immigration hearing on October 8, 2003, Mr. Myers
8 affirmatively informed the court at least twice that he had submitted an N-600 to the immigration
9 service for adjudication. Transcription of Immigration Hearing, Oct. 8, 2003, attached to Linker
10 Auth. Decl. as Exhibit L-3. When the IJ informed Mr. Myers that she could not proceed with the
11 removal hearing if Mr. Myers could establish that Mr. Romero-Romero even had a prima facie
12 case for derivative citizenship, Mr. Myers inaccurately informed the court that the evidence was
13 not available. *Id.* Had Mr. Myers done the investigation he said he was going to do, he would
14 have learned that there was evidence of legal separation available – certainly enough evidence to
15 make out a prima facie case. Ms. Romero was prepared to testify and present evidence that she
16 and Mr. Ventura had been separated in 1992, yet Mr. Myers had never asked her to do so, nor did
17 he inquire about any documentary evidence she may have to show that his parents had a final
18 rupture in the marital relationship in 1992. Instead, Mr. Myers informed IJ Peters that because
19 they did not have any “court documents showing, uhh, divorce or legal separation from his
20 parents” he was not going to make his prima facie case. *Id.*

21 Despite Mr. Myers repeated statements to IJ Peters definitively informing her, the
22 government and his client that he had submitted an N-600 petition for derivative citizenship on
23 behalf of Mr. Romero-Romero to the immigration service, Mr. Myers never filed any such
24 petition.

25 At his fourth hearing on November 14, 2003, neither Mr. Myers nor anyone from his law
26 firm was present for Mr. Romero-Romero's scheduled hearing. *See* Transcription of

1 Immigration Hearing, Nov. 14, 2003, Part I, attached to Linker Auth. Decl. as Exhibit L-4.1. IJ
2 Peters continued the hearing to the afternoon, when she conducted his fifth hearing.
3 Transcription of Immigration Hearing, Nov. 14, 2003, Part II, attached to Linker Auth. Decl. as
4 Exhibit L-4.2. At the later hearing, with only the excuse that a secretary had calendared the
5 hearing incorrectly, another attorney – not Mr. Myers – appeared for Mr. Romero-Romero. *Id.*
6 No explanation was given for Mr. Myers' absence. *Id.* Mr. Romero-Romero's mother and older
7 sister were present in the court room and prepared for the hearing; however, because of the
8 attorney's tardiness, the hearing was continued to January 9, 2004. *Id.*

9 At the final hearing on January 9, 2004, Mr. Myers re-appeared on behalf of Mr. Romero-
10 Romero. Transcription of Immigration Hearing, Nov. 14, 2003, Part II, attached to Linker Auth.
11 Decl. as Exhibit L-5. Present in the courtroom were Mr. Romero-Romero's mother, two older
12 sisters and younger brother. *Id.* At that time, Mr. Romero stipulated to his removal and IJ Peters
13 ordered him removed from the United States to El Salvador. *See id.* & Order of the Immigration
14 Judge dated January 9, 2004 & Warrant of Removal/Deportation dated January 14, 2004,
15 attached to Linker Auth. Decl. as Exhibit F.

16 Mr. Romero-Romero stipulated to his removal and waived his appeal based on the
17 erroneous advise and information of his counsel and of IJ Peters. *See* Declaration of Oscar
18 Ernesto Romero-Romero, Jr., attached to Linker Auth. Decl. as Exhibit G. Mr. Myers informed
19 Mr. Romero-Romero that he had little chance of avoiding deportation at his hearing. Mr. Myers
20 informed Mr. Romero-Romero that if he agreed to be deported, the N-600 that he had filed
21 would still be valid and under consideration by the immigration service and that he could wait to
22 learn the status of the N-600 after he had been deported, rather than wait in custody. Mr.
23 Romero-Romero relied on this information in stipulating to removal and waiving his appeal.

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III. ARGUMENT

A. MR. ROMERO-ROMERO WAS DENIED DUE PROCESS IN HIS DEPORTATION PROCEEDING BECAUSE THE IJ CONSIDERED THE WRONG LEGAL STANDARD AND HIS ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

In general, in order to convict a defendant of violating 8 U.S.C. § 1326, illegal reentry after deportation, the government must prove the following three elements beyond a reasonable doubt: 1) the defendant is an alien; 2) the defendant was previously deported from the United States; and 3) the defendant was found in the United States without the consent of the Attorney General. 8 U.S.C. § 1326(a). As such, a defendant's prior deportation is a predicate element for a prosecution under 8 U.S.C. § 1326. The United States Supreme Court has long established, however, that a prior deportation order cannot serve as a predicate for a subsequent prosecution under 8 U.S.C. § 1326 when the deportation proceedings giving rise to the order were fundamentally flawed. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987).

The Supreme Court's holding is rooted in the Due Process Clause of the Constitution: if 8 U.S.C. § 1326 "envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with constitutional requirement of due process." *Id.* at 838 (emphasis in original). Accordingly, the Court held that a defendant in a prosecution pursuant to 8 U.S.C. § 1326 must be permitted to challenge the lawfulness of the prior deportation. *Id.*

In *Mendoza-Lopez*, the defendants were arrested and deported after a group hearing at which they purportedly waived their rights to apply for suspension of deportation and to appeal. *Id.* at 840. They returned to this country, were once again arrested, and the government charged them with a violation of 8 U.S.C. § 1326. *Id.* at 831. The underlying court found, and the Supreme Court accepted as true, that the Immigration Judge failed to adequately explain the defendants' right to suspension of deportation or their right to appeal. *Id.* at 840. The Supreme Court then held that because the Immigration Judge "permitted waivers of the right to appeal that

1 were not the result of considered judgments by [defendants], and failed to advise [defendants]
 2 properly of their eligibility to apply for suspension of deportation . . . the violation of
 3 [defendants'] rights . . . amounted to a complete deprivation of judicial review.” *Id.* at 841.
 4 Thus, the government would not be permitted to rely on that prior deportation order as reliable
 5 proof of an element of the § 1326 prosecution “[b]ecause [defendants] were deprived of their
 6 rights to appeal and of any basis to appeal since the only relief for which they would have been
 7 eligible was not adequately explained to them . . .” *Id.* at 841, 843. The dismissal of the
 8 indictments against the defendants was required. *Id.* at 843.

9 In response to the holding of *Mendoza-Lopez*, Congress amended 8 U.S.C. § 1326 to
 10 explicitly provide for a three part test for when a defendant can collaterally challenge a prior
 11 deportation in a prosecution under section 1326:

12 In a criminal proceeding under this section, an alien may not challenge the validity
 13 of the deportation order described in subsection (a)(1) of this section or subsection (b) of
 this section unless the alien demonstrates that--

14 (1) the alien exhausted any administrative remedies that may have been available
 15 to seek relief against the order;

16 (2) the deportation proceedings at which the order was issued improperly deprived
 the alien of the opportunity for judicial review; and

17 (3) the entry of the order was fundamentally unfair.

18 8 U.S.C. § 1326(d). To prevail on a collateral attack to a prior deportation on grounds that the
 19 deportation proceedings were fundamentally flawed, the defendant must meet each prong of the
 20 three-part test. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (citing
 21 8 U.S.C. § 1326(d)).

22 If a defendant succeeds in this three part test to collaterally attack the predicate
 23 deportation order, the indictment against him must be dismissed. *See United States v. Lopez-*
 24 *Menara*, 542 F.Supp.2d 1025, 1027 (N.D. Cal. 2008); *United States v. Lopez-Hernandez*, 2007
 25 WL 608111 (N.D.Cal. 2007); *United States v. Andrade-Partida*, 110 F.Supp.2d 1260, 1272
 26 (N.D. Cal. 2000).

B. ENTRY OF THE DEPORTATION ORDER AGAINST MR. ROMERO-ROMERO WAS FUNDAMENTALLY UNFAIR (8 U.S.C. § 1326(D)(1))

Here, Mr. Romero-Romero's collateral challenge to his 2004 deportation order meets each prong of this three-part test. Because the first and second prongs are informed by the third, the below analysis begins with the third prong, *i.e.*, that the entry of the order was fundamentally unfair. "An underlying removal order is 'fundamentally unfair' if (1) an alien's 'due process rights were violated by defects in the underlying deportation proceeding' and (2) 'he suffered prejudice as a result of the defects.'" *Id.* (citing *United States v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000)).

As detailed below, Mr. Romero-Romero's due process rights were violated by defects at his deportation proceedings and he suffered prejudice as a result of those defects. Here, he is claiming two specific defects: (1) although he derived citizenship to the United States on May 30, 2006 when his mother naturalized, the IJ used the wrong standard for derivative citizenship and, as a result, unlawfully ordered the deportation of a citizen of the United States; and (2) his attorney provided constitutionally ineffective assistance of counsel by failing to conduct even a minimal investigation and by failing to file critical documents that he assured his client and the court he had filed. As a result of each of these defects, Mr. Romero-Romero suffered prejudice, *i.e.*, he would not have been deported because he was a citizen of the United States.

1. Mr. Romero-Romero's Due Process Rights Were Violated by the Defects in the Underlying Deportation Proceeding Because The IJ Considered The Wrong Legal Standard for Derivative Citizenship

"The executive may deport certain aliens but has no authority to deport citizens." *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2004) (overruled by statute on other grounds). Thus, an entire deportation proceeding is called into doubt until a claim of citizenship is resolved. *Id.* "Because the deportation of one who so claims to be a citizen obviously deprives him of liberty and may result also in loss of both property and life, or of all that makes life worth living," the deportation of any person with a non-frivolous claim to American citizenship without properly considering that claim violates the due process clause of the Fifth Amendment. *See id.* Here,

1 Mr. Romero-Romero's due process rights were violated because he was ordered deported from
2 the United States when he was – and is – a citizen of the United States. He derived citizenship
3 from his mother on May 30, 1996 when she naturalized as a United States citizen. IJ Peters,
4 however, misconstrued the derivative citizenship statute to require a different standard than that
5 required under the law.

6 Under the current derivative citizenship statute, Mr. Romero-Romero would be a citizen
7 of the United States. That law, enacted as part of the Children Citizenship Act of 2000
8 (hereinafter "CCA"), 8 U.S.C. § 1431, provides that a child born outside of the United States
9 automatically becomes a citizen of the United States when: (1) at least one parent of the child is a
10 citizen of the United States, whether by birth or naturalization; (2) the child is under the age of
11 eighteen; and (3) the child is residing in the United States in the legal and physical custody of the
12 citizen parent pursuant to a lawful admission for permanent residence. Because Mr. Romero-
13 Romero's mother naturalized when he was sixteen years old, and he had been residing in the
14 United States in the legal and physical custody of his mother as an LPR, he would be entitled to
15 citizenship under that section. The Ninth Circuit has held, however, that the streamlined
16 derivative citizenship requirements of the CCA do not apply to those like Mr. Romero-Romero
17 who turned eighteen before February 27, 2001. *See Hughes v. Ashcroft*, 255 F.3d 752, 760 (9th
18 Cir. 2001) ("the CCA granted automatic citizenship only to those children who were under the
19 age of 18, and who met the other criteria, on February 27, 2001."). Rather, "derivative
20 citizenship is determined under the law in effect at time (sic) the critical events giving rise to
21 eligibility occurred." *Minasyan v. Gonzalez*, 401 F.3d 1069, 1075 (9th Cir. 2004).

22 Thus, we look at the law that was in effect at the time Mr. Romero-Romero's mother
23 became a naturalized citizen in 1996. *See id.* Even under the more onerous standard of former
24 Immigration and Nationality Act § 321(a), 8 U.S.C. § 1432 (1996), *repealed by* Pub. L. 106-395,
25 Title I, § 103(a), October 30, 2000, Mr. Romero-Romero still meets the standard for derivative
26 citizenship. That law provides, in pertinent part, that:

1 A child born outside of the United States of alien parents . . . becomes a citizen of the
 2 United States upon fulfillment of the following conditions:

3 * * *

4 (3) The naturalization of the parent having legal custody of the child when there has been
 a legal separation of the parents . . . ; and if

5 (4) Such naturalization takes place while such child is under the age of eighteen years;
 6 and

7 (5) Such child is residing in the United States pursuant to a lawful admission for
 8 permanent residence at the time of . . . the parent naturalized under clause . . . (3) of this
 subsection . . .

9 8 U.S.C. § 1432 (1996).

10 Mr. Romero-Romero meets all three requirements of § 1432. He meets condition (4) as
 11 his mother was naturalized in 1996, when he was sixteen years old. He also meets condition (5)
 12 because he became a lawful permanent resident in 1989, when he was eight years old. He also
 13 meets condition (3) because at the time of his mother's naturalization, his parents had legally
 14 separated and he was in his mother's legal custody. Nonetheless, at his immigration proceeding,
 15 IJ Peters misconstrued the standard for legal separation and incorrectly advised Mr. Romero-
 16 Romero that his parents had to be "divorced" to be eligible for derivative citizenship. The
 17 contrary was true: legal separation under the statute is not so limited, nor is it even limited to
 18 court orders expressly titled "legal separation." *Minasyan*, 401 F.3d at 1078. Rather, "legal
 19 separation" under the INA is guided by the law of the state with jurisdiction over the marriage in
 20 question. *Id.* at 1077. Accordingly, we turn to California law, the state with jurisdiction over the
 21 marriage.

22 In *Minasyan*, the Ninth Circuit examined this exact question and explained that California
 23 law provides for three forms of separation: (1) divorce/dissolution of marriage; (2) legal
 24 separation; and (3) separation by virtue of law. *Id.* at 1078. After "considering which of these
 25 three forms of separation under California law constitute a legal separation for purposes of §
 26 321(a) [8 U.S.C. § 1432(a)]," the Ninth Circuit concluded that it was the most expansive of these
 three forms, a "separation by virtue of law" that "constitutes a legal separation for purposes of

1 the INA.” *Id.* The court explicitly determined that neither a divorce nor an order titled “legal
2 separation” was necessary (although both would be sufficient). *Id.* The court went on to
3 conclude that a separation by virtue of law occurs when spouses are “living separate and apart
4 and there ha[s] been a final rupture of the marital relationship.” *Id.* (internal citations and
5 quotations omitted). The critical aspect of any such separation is the “date of the separation not
6 ... the date of a court order.” *Id.* at 1079.

7 Here, IJ Peters was incorrect about the standard for derivative citizenship. She repeatedly
8 questioned Mr. Romero-Romero about whether his parents were “still married” or divorced and
9 was focused solely on those two options: married or divorced. That, however, does not
10 accurately reflect the derivative citizenship standard. Rather, Mr. Romero-Romero’s parents
11 could be married and not divorced, yet he still could qualify for derivative citizenship if IJ Peters
12 determined they were separated by virtue of law, *i.e.*, if they were living separate and apart and
13 there had been a final rupture of the marital relationship. The IJ misconstrued the standard under
14 the statute and deprived Mr. Romero-Romero of his opportunity to establish his derivative
15 citizenship under the correct standard.

16 During a deportation hearing, the requirement that the IJ inform an alien of any apparent
17 eligibility for relief from deportation and give the alien the opportunity to pursue that form of
18 relief is “mandatory.” *See United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (quoting
19 *United States v. Arce-Hernandez*, 163 F.3d 559, 565 (9th Cir. 1998)). An erroneous
20 determination by an IJ that the alien is statutorily ineligible for relief from deportation also
21 constitutes a denial of due process. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-
22 50 (9th Cir. 2004) (an inaccurate statement that an alien is ineligible for any relief constitutes a
23 breach of the IJ’s duty and a violation of due process). Failure of the IJ to inform the defendant
24 of his eligibility for a waiver of deportation in the underlying proceedings establishes a violation
25 of due process in a collateral appeal in a case brought under 8 U.S. C. § 1326. *See Arrieta*, 224
26 F.3d at 1079. The failure of the IJ to advise an alien of his eligibility for a waiver of deportation

1 violates the alien's due process rights and "amount[s] to a complete deprivation of judicial
 2 review of the determination." *Mendoza-Lopez*, 481 U.S. at 840. "Even if the alien's eligibility is
 3 not clearly disclosed in the record, the IJ has a duty to discuss discretionary relief with the alien
 4 so long as the record as a whole raises a reasonable possibility of eligibility of such relief."
 5 *Andrade-Partida*, 110 F.Supp.2d at 1268.

6 Here, IJ Peters incorrectly informed Mr. Romero-Romero that his parents had to be
 7 divorced in order for him to be eligible for derivative citizenship. In fact, that was not the case,
 8 and his parents' separation was sufficient to establish "legal separation" under the applicable
 9 derivative citizenship statute. *See Minasyan*, 401 F.3d at 1078-79 (9th Cir. 2004). As both Mr.
 10 Ventura and Ms. Romero have stated, as of 1992 when Mr. Ventura was deported from the
 11 United States, they were living separate and apart and there had been a final rupture of the
 12 marital relationship. At that time, they had no intention of resuming marital relations. Indeed,
 13 Mr. Ventura had a child with another woman, and began living a life with his "new" family.
 14 Moreover, IJ Peter's error is not excused by the fact that Mr. Romero-Romero had not yet
 15 documented his citizenship. "Because citizenship is transmitted automatically upon the parent's
 16 naturalization, it does not depend on the filing of an application, an administrative decision, a
 17 court order, an oath of allegiance, or any other procedure." *Minasyan*, 401 F.3d at n.10 (citing
 18 INS Interp. § 320.1(a)(1)). Mr. Romero-Romero automatically derived citizenship in 1996 when
 19 his mother naturalized. As such, IJ Peters order of deportation against him violated his due
 20 process rights.

21 **2. Mr. Romero-Romero's Due Process Rights Were Also Violated by His** 22 **Attorney's Failure to Pursue His Derivative Citizenship Claim**

23 In addition, Mr. Romero-Romero's due process rights were violated by his attorney's
 24 ineffective assistance of counsel. While there is no constitutional right to counsel in deportation
 25 proceedings, *see Castro-Nuno v. INS*, 577 F.2d 577, 578 (9th Cir. 1978), due process must be
 26 accorded. *See United States v. Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978). "Ineffective
 assistance of counsel in a deportation proceeding is a denial of due process under the Fifth

1 Amendment if the proceeding was so fundamentally unfair that the alien was prevented from
2 reasonably presenting his case.” *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985). Due
3 process challenges to deportation proceedings normally require a showing of prejudice. *See Lata*
4 *v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (alien must show error and prejudice on ineffective
5 assistance claim); *see also Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994). “Prejudice is
6 found when the performance of counsel was so inadequate that it may have affected the outcome
7 of the proceedings.” *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). However, there is a
8 presumption of prejudice where judicial review of the deportation was foreclosed by flaws in the
9 administrative proceedings. *See United States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994)
10 (“The only circumstance under which we suggested no showing of prejudice was necessary was
11 ‘when the administrative proceedings were so flawed’ that an effective judicial review of a
12 deportation, which might otherwise have been prevented, would be foreclosed.”).

13 In examining claims of ineffective assistance of counsel as a due process violation, the
14 Ninth Circuit looks to Sixth Amendment right to counsel jurisprudence as a guide. *See*
15 *Dearinger v. Reno*, 232 F.3d 1042 (9th Cir. 2000). Counsel’s dereliction of duties need not
16 deprive petitioner of any constitutional right to violate due process; only prejudicial ineffective
17 assistance of counsel need be shown. *Id.* (finding ineffective assistance from counsel’s failure to
18 file timely petition for review even though there is no constitutional right to petition the federal
19 courts).

20 The Ninth Circuit has found ineffective assistance of counsel resulting in a due process
21 violation on many occasions. For example, in *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004),
22 the court found prejudicial ineffective assistance where the attorney failed to file an appellate
23 brief under after the deadline had passed. *Id.* at 1184. When the attorney attempted to file the
24 brief late, it was returned by the BIA with instructions that it should be resubmitted with a
25 motion for consideration of a late-filed brief. *Id.* The attorney did not attempt to refile the brief
26 and did not inform his client of the communication from the BIA. *Id.* The Ninth Circuit

1 concluded that the attorney's actions constituted ineffective assistance of counsel. *Id.* at 1189-
2 90.

3 In *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000), the court concluded that the
4 petitioner had stated a "clear and obvious case" of ineffective assistance from counsel's failure to
5 timely file an application for suspension of deportation in spite of telling the client that he had
6 done so. Prejudice clearly resulted because counsel's performance may have affected the
7 outcome and the court remanded for a new hearing so that petitioner could apply for suspension
8 of deportation. *Id.* at 528 & n.12. Even though the law had since changed, the court emphasized
9 that on remand the immigration court must apply the law as it existed at the time of the due
10 process violation from counsel's deficient performance, in order to protect petitioner's rights to
11 the same extent his attorney should have done in the first instance. *Id.* at 528.

12 Likewise, in *Dearinger v. Reno*, 232 F.3d 1042 (9th Cir. 2000), the court affirmed the
13 grant of a habeas corpus petition alleging ineffective assistance of counsel from his failure to file
14 a timely petition for review. This was a due process violation, according to the court, because the
15 error deprived petitioner of an appellate proceeding entirely. Prejudice was presumed as the
16 "adversary process itself has been rendered presumptively unreliable" and cannot be
17 "accord[ed] any presumption of reliability." *See id.* at 1045 (quoting *Roe v. Flores-Ortega*, 120
18 S.Ct. 1029, 1038 (2000) (finding ineffective assistance in failure to perfect appeal under Sixth
19 Amendment right to counsel)); *see also Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (allowing
20 tolling of 180-day time bar based on fraud and ineffective assistance by a non-lawyer "counsel"
21 who posed as an attorney).

22 In this case, Immigration Specialist Angela Bean has identified numerous errors made by
23 Mr. Myers that substantially prejudiced Mr. Romero-Romero. At the time of the hearing, "Mr.
24 Romero-Romero could have presented a claim to derivative citizenship based on his mother's
25 naturalization." *See* Declaration of Angela Bean (hereinafter "Bean Decl.") attached to Linker
26 Auth. Decl. as Exhibit J. "That Mr. Romero-Romero's parents did not have a legal separation

1 order at the time of his hearing did not preclude his citizenship claim.” *Id.* Rather, Mr. Myers
2 could have nonetheless presented his claim.

3 “At a minimum,” Mr. Myers should have consulted with a family law attorney about how
4 the parents’ separation would be considered under the law. Mr. Myers stated on the record that
5 he knew that when Ms. Romero naturalized, Mr. Romero-Romero was an LPR, under 18 years of
6 age, in the sole custody of his mother, and his father had been deported from the United States.
7 He said to the IJ: “He was out of the country, he wasn’t here with the family at all.” *See*
8 Transcription of Immigration Hearing, Sept. 16, 2003, attached to Linker Auth. Decl. as Exhibit
9 L-2. Certainly, that was enough to warrant at least a consultation with a family law specialist.

10 Moreover, and in Ms. Bean’s professional experience “[p]erhaps most egregious is Mr.
11 Meyers’ apparent failure to file a Form N-600 application for certificate of citizenship despite his
12 claim to the immigration court on October 8, 2003 that he had already done so.” *See* Bean Decl.,
13 attached to Linker Auth. Decl. as Exhibit J. An N-600 application would be an acknowledgment
14 of derivative citizenship decided by the United States Citizenship and Immigration Services
15 (hereinafter “USCIS”). Moreover, derivative citizenship is not a discretionary benefit and
16 therefore his criminal record would not have been an impediment to approval. *Id.* A thorough
17 review of Mr. Romero-Romero’s A-file, however, reveals that no such document was ever filed.
18 *Id.* “Such an omission is not only a failure to represent Mr. Romero-Romero properly but also an
19 apparent misrepresentation to the immigration court.” *Id.*

20 In addition, Mr. Myers failed to present Mr. Romero-Romero’s citizenship claim in two
21 other available forms. *Id.* First, “he could have assisted Mr. Romero-Romero in applying for a
22 U.S. Passport.” *Id.* That would have been adjudicated by the Department of State, and was
23 another avenue to document his citizenship. *Id.* Yet, Mr. Myers failed to undertake this action.
24 Second, Mr. Myers could have sought to “terminate the removal proceedings directly, on the
25 ground that Mr. Romero-Romero was not an alien.” *Id.* IJ Peters was required to make an
26 independent determination of alienage, and Mr. Myers failure to present motion to terminate the

1 proceedings is especially problematic here because the immigration judge recognized that she
2 could not proceed if Mr. Meyers were able to present a prima facie case for U.S. citizenship,
3 thereby signaling to Mr. Myers that he could take action. *Id.* He still did nothing.

4 Finally, Mr. Myers failed in his duty to undertake even the most minimal investigation of
5 Mr. Romero-Romero's case. *See id.* Had he done such an investigation, it "would have made
6 apparent that Mr. Romero-Romero could present a *strong* citizenship claim." *Id.* (emphasis
7 added). In sum, Mr. Myers' performance was significantly deficient.

8 **3. Mr. Romero-Romero Suffered Prejudice As a Result of These Defects**

9 To satisfy a showing of prejudice, an "alien does not have to show that he actually would
10 have been granted relief. Instead, he must only show that he had a 'plausible' ground for relief
11 from deportation." *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004)
12 (quoting *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)). Although the Ninth
13 Circuit has not defined the term "plausible," "this standard would seem to encompass borderline
14 cases, perhaps even where the equities are in equipoise. Stated differently, it seems fair to
15 interpret this standard as granting defendants in illegal entry cases the benefit of the doubt, even
16 if they have a borderline claim of prejudice, as long as they establish that their deportation
17 proceeding was procedurally deficient." Wible, Brent S., *The Strange Afterlife of Section 212(c)*
18 *Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After St.*
19 *Cyr*, 19 GEO. IMMIGR. L.J. 455, 475 (Summer 2005). Thus, under applicable law, Mr. Romero-
20 Romero **need not** show that he actually would have been granted relief, or even that there was a
21 reasonable probability that he would have been granted relief. *See United States v. Muro-Inclan*,
22 249 F.3d 1180, 1184 (9th Cir. 2001). A showing of plausible or possible granting of relief is
23 sufficient.

24 Here, as explained above, there is little question that Mr. Romero-Romero was prejudiced
25 by the defects in his immigration proceeding: he had more than a plausible claim to relief;
26 indeed, as a result of the defects, a citizen of the United States was deported. There is no greater

1 prejudice. Had the IJ properly construed the derivative citizenship statute, Mr. Romero-Romero
2 would have presented evidence that his parents had legally separated in 1992. Specifically, his
3 mother would have testified and presented evidence that she and Mr. Ventura had separated in
4 1992. She would have been able to testify that he had been arrested trying to smuggle another
5 woman into the United States, and that he had been having an affair with that woman. She
6 would have been able to testify that this other woman, Ms. Torres, was pregnant with Mr.
7 Ventura's child, and that Ms. Torres gave birth to Mr. Ventura's child on September 10, 1991.
8 She would have testified that as of that date, there was a parting of ways with no present
9 intention of continuing the marital relationship. In addition, three of Mr. Romero-Romero's
10 siblings were also present at his deportation hearing on January 9, 2004. Any and all of them
11 also could have testified to this same information. As such, Mr. Romero-Romero had *at least* a
12 plausible claim to derivative citizenship.

13 To compound the prejudice created by the IJ's defects, Mr. Romero-Romero also suffered
14 prejudice as a result of Mr. Myers' incompetent assistance. Where an alien loses his right to
15 appeal through the action of his attorney, there is a presumption of prejudice because he was
16 completely deprived of the appellate proceeding. *See Singh v. Ashcroft*, 367 F.3d 1182, 1189
17 (9th Cir. 2004). As the Ninth Circuit explains,

18 [W]here an alien is prevented from filing an appeal in an immigration proceeding due to
19 counsel's error, the error deprives the alien of the appellate proceeding entirely. And . . .
20 this error mandates a presumption of prejudice because the adversary process itself has
21 been rendered presumptively unreliable.

22 *Singh*, 367 F.3d at 1189 (quoting *Dearinger*, 232 F.3d at 1045). This presumption of prejudice
23 can be rebutted only if the alien did not have plausible grounds for relief from deportation. *See*
24 *id.* Here, the Court should presume prejudice because Mr. Romero-Romero lost his right to
25 appeal in reliance on his attorneys misrepresentations, including his inaccurate statement that he
26 had filed an N-600 on Mr. Romero-Romero's behalf.

Regardless, even if this Court does not presume prejudice, Mr. Romero-Romero suffered
actual prejudice from Mr. Myers incompetence. Ms. Bean has identified three different avenues

1 to relief that Mr. Myers should have sought for Mr. Romero-Romero: (1) filing an N-600 with
2 the USCIS; (2) requesting a passport from the Department of State; and (3) seeking to terminate
3 the removal proceedings before IJ Peters. *See* Bean Decl., attached to Linker Auth. Decl. as
4 Exhibit J. Mr. Romero-Romero had a strong claim to derivative citizenship and it is more than
5 plausible that had Mr. Myers sought relief through any one of these avenues Mr. Romero-
6 Romero would have been granted citizenship, or at a minimum, avoided deportation. Yet, Mr.
7 Myers did nothing.

8 Had Mr. Myers done even the most minimal investigation he would have learned about
9 Mr. Romero-Romero's parents separation in 1992. Any competent immigration attorney would
10 have taken appropriate steps to conduct this basic investigation. *See* Bean Decl., attached to
11 Linker Auth. Decl. as Exhibit J. Indeed, even Mr. Myers himself said on the record that he was
12 going to talk with Mr. Romero-Romero's mom about the status of her marriage. He never did
13 that. Additionally, he said he was going to investigate what happened after Mr. Romero-
14 Romero's father was deported from the United States in 1992. He never did that either. Had he
15 done so, he would have learned that Mr. Romero-Romero's parents separated in 1992 and he
16 could have made, at a minimum, a prima facie claim to derivative citizenship. In addition, *even*
17 *if* he thought that he needed an order from the court entitled "legal separation," which he did not,
18 had he asked Ms. Romero to file for such a petition, she would have done so. Instead, Mr. Myers
19 wholly abandoned his role as Mr. Romero-Romero's advocate. *See id.*

20 Moreover, Mr. Myers' failure to file an N-600 on Mr. Romero-Romero's behalf, as well
21 as his affirmative misstatement to the court that he had filed such a document when he had not,
22 further prejudiced Mr. Romero-Romero. Had the N-600 been filed, it was more than plausible
23 that it would have been granted because he had a "strong" derivative citizenship claim. *Id.*
24 Moreover, Mr. Romero-Romero would not stipulated to removal and waived his appeal had he
25 not relied on his counsel's statements about the continued validity of his N-600. Mr. Romero-
26 Romero was substantially prejudiced by his attorney's deficient performance: Mr. Myers' errors

1 completely prevented Mr. Romero-Romero from having a full and fair opportunity to have his
2 strong derivative citizenship claim considered by the IJ or the immigration service.

3 In short, Mr. Romero-Romero's circumstances at the time of his deportation proceeding
4 demonstrate that it was more than plausible that he would have obtained derivative citizenship
5 had IJ Peters not erred in the standard for derivative citizenship and had his attorney not provided
6 deficient representation.

7 **C. AS MR. ROMERO-ROMERO WAS MIS-ADVISED BY THE IJ AND HIS**
8 **ATTORNEY, HIS WAIVER OF APPEAL WAS NOT KNOWING AND**
9 **INTELLIGENT AND HE WAS DENIED THE OPPORTUNITY FOR JUDICIAL**
10 **REVIEW (8 U.S.C. § 1326(D)(1) AND (D)(2))**

11 **1. If Mr. Romero-Romero Must Exhaust His Administration Remedies,**
12 **Because His Waiver of Appeal was Not Knowing and Intelligent, He is**
13 **Deemed to Have Exhausted his Administrative Remedies**

14 While 8 U.S.C. § 1326(d)(1) requires that an alien exhaust all administrative remedies
15 before a collateral attack will succeed, the Ninth Circuit has held that a similar statutory
16 exhaustion requirement did not apply where there was a non-frivolous claim to citizenship.
17 *Minasyan*, 401 F.3d at 1074-75 (holding that "the statutory administrative exhaustion
18 requirement of [8 U.S.A.] § 1252(d)(1) does not apply to a person with a non-frivolous claim to
19 U.S. citizenship even if he has previously been (illegally) deported by the government." (internal
20 quotations and citations omitted.)). Because Mr. Romero-Romero's claim to citizenship is not
21 patently frivolous, he must be excused from the exhaustion requirement.

22 Even if this Court determines that Mr. Romero-Romero must meet the exhaustion
23 requirement of 8 U.S.C. § 1326(d)(1), the exhaustion requirement "cannot bar collateral review
24 of a deportation proceeding when the waiver of right to an administrative appeal did not comport
25 with due process." *Ubaldo-Figueroa*, 364 F.3d at 1048 (citing *United States v. Muro-Inclan*, 249
26 F.3d 1180, 1183-84 (9th Cir. 2001)). The Due Process Clause requires that an alien's waiver of
his right to appeal a deportation order be "considered and intelligent." *See id.* at 1049; *see also*
Mendoza-Lopez, 481 U.S. at 839. An alien who is not advised of his rights cannot make a
"considered and intelligent" waiver, and is thus not subject to the exhaustion of administrative

remedies requirement of 8 U.S.C. § 1326(d). *See Ubaldo-Figueroa*, 364 F.3d at 1049-50; *Pallares*, 359 F.3d at 1096 (“Where ‘the record contains an inference that the petitioner is eligible for relief from deportation,’ but the IJ fails to ‘advise an alien of this possibility and give him an opportunity to develop the issue,’ we do not consider an alien’s waiver of his right to appeal his deportation order to be ‘considered and intelligent.’”) (citing *Muro-Inclan*, 249 F.3d at 1182) (remaining citations omitted.). As such, under Ninth Circuit precedent, the undisputed failure of the IJ or any immigration official to correctly advise Mr. Romero-Romero of his eligibility for derivative citizenship – and the affirmative *mis-statement* of the standard for such relief – excuses Mr. Romero-Romero from the administrative remedies exhaustion requirement of his collateral attack under 8 U.S.C. § 1326(d)(1). In addition, Mr. Romero-Romero’s reasonable reliance on his attorney’s false statement to him and the immigration court that he had filed an N-600, which would remain valid and subject to adjudication after his removal, further excuses the exhaustion requirement.

2. Mr. Romero-Romero Was Deprived of An Opportunity for Judicial Review

Because Mr. Romero-Romero has a non-frivolous claim to citizenship, he was similarly deprived of an opportunity for judicial review based on the defects at his immigration hearing. *See Rivera*, 394 F.3d at 1136. It is not possible to “unintentionally relinquish U.S. citizenship[;] [t]he Constitution does not permit American citizenship to be so easily shed.” *Minasyan*, 401 F.3d at 1075 (internal quotations and citations omitted). Indeed, an immigration judge is obligated to advise an alien regarding apparent avenues for relief from deportation. *See, e.g., Duran v. INS*, 756 F.2d 1338, 1341-42 (9th Cir.1985) (citing 8 C.F.R. § 242.17(a) (1984)). When the IJ fails to so advise, the Ninth Circuit has held that aliens are deprived a meaningful opportunity for judicial review. *See, e.g., Pallares-Galan*, 359 F.3d at 1098 (“For the same reasons [as those stated to find that Pallares’ waiver of appeal was procedurally defective] we hold that Pallares was deprived of a meaningful opportunity for judicial review”); *see also Ubaldo-Figueroa*, 364 F.3d at 1050 (same); *see also Andrade-Partida*, 110 F. Supp at 1271

1 (finding that the IJ's failure to advise of section 212(c) relief deprived the alien of judicial
2 review). Mr. Romero-Romero thus meets this prong of a collateral attack on his deportation
3 proceeding. Moreover, Mr. Romero-Romero's relied on his attorney's inaccurate advise and
4 misinformation to waive his appeal and stipulate to removal further evidences the denial of his
5 meaningful opportunity for judicial review.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Mr. Romero-Romero respectfully requests that this Court
8 dismiss the indictment in the instant case.

9 Dated: June 11, 2008

10 Respectfully submitted,

11 BARRY J. PORTMAN
12 Federal Public Defender

13 /s/

14 JODI LINKER
15 Assistant Federal Public Defender
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